Nos. 07-2008, 07-2111

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NORTH CAROLINA PRISONER LEGAL SERVICES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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(29 U.S.C. § 151 et seq.)

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of North Carolina Prisoner Legal Services, Inc. ("NCPLS") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Order against NCPLS. The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(a),

which empowers the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), because the unfair labor practices occurred in North Carolina.

The Board's Decision and Order was issued on September 29, 2007, and is reported at 351 NLRB No. 30, 2007 WL 2899732. (JA 773-805.)[1] That Order is final under Section 10(e) and (f) of the Act. The petition for review, filed by NCPLS on October 10, 2007, was timely, as was the Board's cross-application for enforcement, filed on November 16, 2007. The Act places no time limitation on such filings.

STATEMENT OF THE ISSUE PRESENTED

The central issue is whether substantial evidence supports the Board's conclusion that NCPLS violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by threatening its employees and retaliating against them because of their concerted opposition to NCPLS's benefits policies and proposed work-schedule changes. Resolution of that issue turns on the following subsidiary questions:

1) whether substantial evidence supports the Board's credibility-based conclusion that NCPLS violated Section 8(a)(1) of the Act by repeatedly threatening employees with reprisal;

[1] Cites to "JA" refer to the parties' joint appendix. Record references preceding a semicolon are to the Board's findings; those following are to the supporting evidence. Cites to "Br" refer to NCPLS's opening brief.

2) whether substantial evidence supports the Board's conclusion that NCPLS violated Section 8(a)(1) of the Act by deferring a pay increase, cancelling a short-term disability policy, and terminating reduced-hours work schedules, all because of employees' protected activities; and

3) whether substantial evidence supports the Board's conclusion that NCPLS violated Section 8(a)(1) of the Act by constructively discharging attorney Linda Weisel because of her protected activities.

STATEMENT OF THE CASE

This case came before the Board on a complaint issued by the Board's General Counsel on June 8, 2004, pursuant to a charge filed by former NCPLS attorney Linda Weisel. (JA 497-503.) The General Counsel's complaint alleged that NCPLS violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by: (i) making numerous threats of reprisal against its employees; (ii) retaliating against employees' protected activities by deferring a pay increase, terminating a short-term disability policy, and eliminating reduced-hours work schedules; and (iii) constructively discharging NCPLS attorney Weisel because of her protected activities. (*Id.*)

An administrative law judge heard arguments and took evidence during a 7-day hearing ending on August 5, 2004. (JA 784-805.) On December 16, 2004, the judge issued a decision finding merit to the unfair labor practices charged in the General Counsel's complaint. (*Id.*) NCPLS then sought review of the judge's decision by filing exceptions to the Board. (JA 702-37.)

On September 29, 2007, the Board (Chairman Battista and Member Walsh, Member Schaumber dissenting in part) issued its Decision and Order affirming the judge's conclusion that NCPLS violated Section 8(a)(1) of the Act. (JA 20-29.) That Decision and Order is summarized in greater detail below.

The instant appeal followed when NCPLS filed its petition for review, and the Board filed its cross-application for enforcement. On November 11, 2007, NCPLS filed a motion for this Court to hold the appeal in abeyance pending a summary judgment ruling in *Pollitt v. North Carolina Prisoner Legal Services, Inc.* (E.D.N.C. No. 05-CV-220), a suit filed against NCPLS by former NCPLS attorneys Susan Pollitt and Kari Hamel alleging, among other things, that NCPLS retaliated against them in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. This Court denied NCPLS's motion on December 3, 2007.[2]

[2] After this Court denied NCPLS's motion, District Judge Terrence Boyle denied NCPLS's motion for summary judgment in the Title VII action. A pretrial conference in the matter is currently set for July 10, 2008.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. NCPLS Provides Legal Services Pursuant to a Contract with the State; Its Attorneys Are Permitted To Work Reduced-Hours Schedules

NCPLS is a nonprofit corporation that provides legal services to inmates in the North Carolina prison system. (JA 774; 500, 508.) It is governed by a board of directors ("NCPLS board"), and its operations are managed by Executive Director Michael Hamden. (JA 774; 258) NCPLS is primarily funded through a contract with the North Carolina Department of Corrections ("DOC"). (JA 774; 608-21.) Under this arrangement, NCPLS received fixed payments from DOC in exchange for the performance of a specified number of hours of legal services for inmates. (*Id*.)

When a new contract with DOC has been signed, NCPLS generally grants pay increases to its employees. (JA 744; 25-26, 90.) In order for a pay increase to occur, Hamden first recommends the increase, and that recommendation must be approved by the NCPLS board. (JA 774; 287.)

NCPLS closely monitors its progress on the contract hours and regularly reports that progress to the NCPLS board. (JA 777; 310, 371-72, 419-20.) When NCPLS has fallen behind on contract hours, its usual practice has been to eliminate the shortfall by hiring contract attorneys on a temporary basis or by having its

existing attorneys work additional hours in proportion to their respective schedules—either full-time, part-time, or "reduced-hours." (JA 778; 52, 220-21.)

Full-time NCPLS attorneys work 40 billable hours per week, and receive full benefits. (JA 785; 24-25, 520-23.) Part-time attorneys work less than 30 billable hours per week and receive no benefits. (*Id*.) "Reduced-hours" attorneys work 30 to 32 billable hours per week and receive benefits. (*Id*.) In 2003, only one attorney worked a part-time schedule, and four attorneys—Kari Hamel, Kristin Parks, Susan Pollitt, and Linda Weisel—worked reduced-hours schedules. (JA 785; 25-26, 86, 194.) All four of the attorneys working reduced hours are working mothers. (*Id.*)

On May 16, 2003,[3] NCPLS entered a 3-year contract with DOC that was made retroactive to October 1, 2002. (JA 774; 608-21.) Shortly after NCPLS began operating under the new contract, it was approximately 1200 hours behind schedule. (JA 775; 295.)

B. One NCPLS Attorney Submits a Claim for Pregnancy-Related Disability Benefits and Files a Discrimination Claim Against NCPLS When Her Disability Claim Is Denied; A Group of Attorneys Writes a Petition to the NCPLS Board Protesting the Administration of NCPLS's Disability Policy

As part of its benefits package for employees, NCPLS maintained a self-funded and self-administered short-term disability policy. (JA 774; 524-25.) In

[3] Unless otherwise noted, all dates are in 2003.

early 2003, Hamel, who was nearing the end of a pregnancy, requested both unpaid maternity leave and disability benefits under the NCPLS policy for a temporary disability arising from her pregnancy. (JA 774; 78-79.) Hamden granted the request for maternity leave, but he denied the request for disability benefits. (*Id*.) Hamel discussed the denial of her disability claim extensively with other NPCLS attorneys including Parks, Pollitt, Weisel, and Elizabeth Hambourger. (JA 774; 80-82.)

Hamel retained an attorney and continued to press for disability benefits by appealing Hamden's decision to the NCPLS board, where the matter was handled by board member Barry Nakell. (JA 774; 83.) That spring, Hamel's attorney wrote a letter to Nakell contending that NCPLS's refusal to apply its short-term disability policy to pregnancy-related disabilities violated Title VII. (JA 774; 566-67.) In response, Nakell inquired whether Hamel took the position that the policy was unlawful on its face. (JA 774; 571-73.) Hamel's attorney answered that she was only challenging the legality of "how the policies are applied." (*Id*.)

On July 22, after consulting with several of her colleagues, Hamel filed a charge against NCPLS with the Equal Employment Opportunity Commission ("EEOC"). (JA 774; 565.) Hamel filed the charge on behalf of herself and similarly-situated NCPLS employees. (*Id*.) The charge alleged that NCPLS's denial of Hamel's disability claim violated Title VII. (*Id*.)

Shortly afterward, Hambourger began drafting a petition to the NCPLS board in support of Hamel's claim for disability benefits. (JA 774; 159-63, 545.) On August 8, copies of the completed petition were delivered to each member of the NCPLS board and to members of NCPLS's management. (*Id*.) The petition was signed by 17 NCPLS attorneys and stated, in part:

> [W]e want to let the Board know how important our benefits are to us. We hope short-term disability insurance will remain a benefit for NCPLS employees and that it will apply to temporary disability arising from pregnancy and childbirth as it does to any other short-term disability.

(JA 774; 545.)

C. Hamden Responds to the August 8 Petition by Threatening Employees with Reprisal and Withdrawing a Recommendation for a Pay Increase; One Week Later, the NCPLS Board Adopts Hamden's Recommendation to Withhold the Pay Increase and Repeals the Short-Term Disability Policy

Hamden's response to the employees' petition was hostile. Upon learning of the petition, Hamden—in a conversation with George Hausen, the director of another legal services program—called the employees' actions a "mutiny." (JA 774-75; 492.)

On August 13, one day after a contentious staff meeting at which the petition was discussed, Hamden called Hambourger to his office. (JA 775; 166-68.) He told her that he had not realized the extent of the "factionalism" in the office, that he had been "too indulgent" with the staff, and that "things were going to change."

(*Id.*) He added that the employees would be less likely to achieve their goals because they had gone to the NCPLS board. (*Id.*) When Hambourger asked Hamden what he meant, he explained, "[B]ecause of this letter I cannot ask the Board to give the staff raises," and, "[B]ecause of the letter you are now less likely to get a parental leave policy in place." (*Id.*) He warned that the NCPLS board would be "angry" about the petition and would "want to show the staff that they're not entitled to these things by withholding things." (*Id.*)

Prior to the circulation of the August 8 petition, Hamden had budgeted a six-percent pay increase for all staff members. (JA 775; 462.) Approval for the pay increase was placed on the agenda for the upcoming August 15 board meeting. (JA 775; 607.) However, a day or two before the meeting (and less than one week after the employees' petition), Hamden met with Fiscal Officer Rick Lennon and informed him of his decision to withdraw the recommendation for the pay increase. (JA 775; 460-61.) Lennon—who had earlier told the employees who circulated the petition that he felt "betrayed" by their actions and that it was wrong for the employees to go "behind [Hamden's] back"—agreed with Hamden's decision. (JA 774-75; 122, 460-62.)

At the August 15 board meeting, Lennon advised the NCPLS board of Hamden's recommendation to withhold the pay increase because of "employee complaints and ongoing litigation." (JA 775; 438.) During a closed session that

followed, the NCPLS board voted to withhold the budgeted pay increase. (JA 775; 546.) The minutes of that meeting state: "The current budget includes a 6% staff salary increase, but in light of staff benefit concerns and pending litigation, discussion of staff pay raises was deferred." (*Id.*) During the same closed session, the NCPLS board also repealed the short-term disability policy. (*Id.*)

D. Hamden Proposes Eliminating Reduced-Hours Work Schedules and Abandons the Proposal After Employees Concertedly Oppose It; Later, Hamden Eliminates Reduced-Hours Work, Precipitating the Resignation of Weisel and Two Other Attorneys

Days later, on August 19, Hamden called a meeting of the entire staff. Nakell attended part of the meeting and spoke briefly, telling the gathered employees that the NCPLS board was "fully in support" of Hamden. (JA 775; 32-37.) Hamden then informed the staff that the NCPLS board had rescinded the short-term disability policy. (*Id.*) Hamden also announced a proposal to eliminate the reduced-hours work schedule by requiring all attorneys to work 40 billable hours per week to qualify for benefits. (*Id.*) In addition, Hamden proposed requiring all attorneys to work 8 additional billable hours, for a total of 48 billable hours per week, until at least November 15. (*Id.*) Hamden attributed the need for the 48-hour workweek to the contract-hours deficit and to "factionalism" in the office. (*Id.*) Hamden gave the staff one week to provide their input on the proposal. (*Id.*)

Pollitt and Weisel met with Nakell to express their concerns regarding Hamden's proposal and their impression that Hamden was retaliating against them. (JA 775; 37-40, 61, 196.) In addition, they detailed their concerns in a letter to Hamden, explaining that they had been working reduced hours for many years and their family obligations had been structured around that schedule. (JA 775; 553-54.) The letter pointed out that Hamden's proposal would require a disproportionate increase in workload for reduced-hours employees, all of whom were women, and that a requirement of additional work should be proportional to employees' regular work hours, as it had been in the past. (*Id*.)

Parks met with Hamden on August 23 to discuss his proposal. He asked her if she knew that some attorneys had gone to the NCPLS board "behind his back." (JA 775; 125-27.) He warned that this was "not the way to get things done around here and I'm just not going to have that kind of thing anymore." (*Id.*) Hamden also told Parks that Pollitt and Weisel "continued to undermine" his authority and "stir up trouble," and that he could not "put up with it anymore." (*Id*.)

On August 26, Hamden announced that he had decided not to implement his proposal. (JA 775; 127-29.) But later that day, when Parks thanked him for withdrawing the proposal, Hamden stated, "Well, you know, I could still do 40 hours a week if that's what I choose to do." (*Id*.) In another conversation with Parks, Hamden said of his proposal to eliminate reduced-hours schedules: "It's not

because of the contract hours and it's not because of the money for the benefits, but it's because some people here think it's an entitlement to work part-time." (*Id*.)

On October 1, Hamden approached Pollitt and told her that, contrary to his earlier announcement, he was going to eliminate reduced-hours schedules and require all attorneys to work 40 billable hours per week in order to qualify for benefits. (JA 776; 47.) When Pollitt asked for an explanation, Hamden stated that part of his motivation was the "hostility" he received in response to his earlier proposal. (*Id*.) He added that he "couldn't take that kind of hostility." (*Id.*) In the same conversation, he accused Pollitt and Weisel of "threaten[ing] gender litigation" and criticized them for thinking that working a reduced-hours schedule was an "entitlement." (*Id*.) Later that day, Hamden sent an e-mail announcing the elimination of reduced-hours work schedules for all NCPLS employees. (JA 776; 563.)

Following Hamden's elimination of reduced-hours schedules, three of the four attorneys who worked reduced hours—Hamel, Parks, and Weisel—all resigned. (JA 776; 581, 583, 586.) The fourth attorney, Pollitt, continued her employment at NCPLS, but was forced to supplement the hours she worked with accrued leave to fulfill the 40-hour requirement. (JA 776; 50, 587-88.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board found that NCPLS violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by: (i) making numerous threats of reprisal against its employees; (ii) deferring a pay increase, terminating a short-term disability policy, and eliminating reduced-hours work schedules because of employees' protected activities; and (iii) constructively discharging Weisel because of her protected activities. (JA 773-80)

The Board's Order requires NCPLS to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (*Id.*) Affirmatively, the Order requires NCPLS to take the following actions: (i) institute the unlawfully withheld pay increase, with interest; (ii) reinstitute the reduced-hours work schedule; (iii) make whole NCPLS employees for any losses resulting from the unlawful withholding of the pay increase, elimination of short-term disability benefits, and elimination of reduced-hours work schedules; (iv) offer Weisel reinstatement to her former position, make her whole for any losses resulting from her constructive discharge, and remove from NCPLS's files any references to the constructive discharge; and (v) post copies of a remedial notice. (*Id.*)

SUMMARY OF ARGUMENT

The Board seeks enforcement of its Order finding that NCPLS committed a panoply of violations of Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer to interfere with employees' right to engage in concerted activities for the purpose of mutual aid or protection. As the Board found, NCPLS violated Section 8(a)(1) by repeatedly threatening its employees with reprisal, by taking a variety of adverse actions against them, and by constructively discharging one attorney—all in retaliation for the employees' extensive protected activities in protest of NCPLS's benefit policies and proposed work-schedule changes. The Board's findings on those violations are supported by an abundance of direct and circumstantial evidence. And because this Court is obligated to accept such well-supported findings as conclusive, especially when they are based on determinations of credibility, it must enforce the Board's Order.

NCPLS seeks to overturn the Board's Order in every respect. But its challenge can only succeed if this Court were to reject wholesale the credited testimony and adopt a highly selective interpretation of testimony that was discredited based on the judge's first-hand observation of the witnesses. NCPLS's challenge founders at its most basic level because it is not the role of this Court, viewing a cold record, to determine which witnesses were more credible or truthful. And NCPLS has failed to adduce the kinds of extraordinary

circumstances that would permit this Court to second-guess a judge's credibility findings.

A. The Board reasonably concluded that NCPLS violated Section 8(a)(1) when Hamden made numerous threats of reprisal against NCPLS employees because of their protected activities. Those included ominous and unspecified threats to one employee that he had been "too indulgent" with the employees and that "things are going to change," as well as his statement to another employee that employees were going "behind his back" and that he was "just not going to have that kind of thing anymore." The Board also found that Hamden made coercive threats of economic reprisal by stating to an employee that "because of [the employees' petition] I cannot ask the Board to give the staff raises" and that "because of the [petition] you are now less likely to get a parental leave policy in place." NCPLS's only rejoinder to these well-supported violations is to dispute the veracity of the credited testimony that supports them. But, again, NCPLS misunderstands the role of the appellate court, which is to defer to the factfinder's credibility findings unless extraordinary circumstances—which have not been shown here—dictate otherwise.

B. Substantial evidence supports the Board's conclusion that NCPLS committed numerous violations of Section 8(a)(1) of the Act by taking adverse actions against its employees in retaliation for their protected activities—including

withholding a pay increase, terminating its short-term disability policy, and eliminating reduced-hours work schedules. The only issue in dispute on all of these violations is whether NCPLS's actions were motivated by unlawful considerations. The Board's conclusion in this regard is supported by ample direct and circumstantial evidence.

1. Substantial evidence supports the Board's conclusion that NCPLS's decision to withhold pay increases was tainted by an unlawful motive and therefore violated Section 8(a)(1) of the Act. That finding is supported by direct evidence of the NCPLS board's motivation showing that it withheld the pay increase because of "staff benefit concerns and pending litigation"—or, in other words, because of the very activity that NCPLS now admits was protected by the Act. Indeed, this evidence amounts to an outright confession of the violation.

On top of that, the Board's finding of a violation is also supported by ample circumstantial evidence of unlawful motive. First, the Board reasonably concluded that the close temporal connection between the protected conduct and NCPLS's adverse action strongly supports the inference that NCPLS was unlawfully motivated. Second, NCPLS's departure from its usual practice—which was to award pay raises whenever it entered a new contract with DOC—provides additional evidence that signal NCPLS's illicit motives. Finally, the Board also reasonably relied on its well-supported conclusion that NCPLS's asserted

justifications for its actions were pretext and were not actually relied upon in making the decision to withhold the raise.

Just as it fails to rebut the Board's conclusions, NCPLS also fails in its effort to argue that the Board improperly imputed Hamden's documented hostility toward the employees' protected activity to an otherwise innocent NCPLS board. Because the NCPLS board expressly adopted Hamden's retaliatory motives, there was no need for the Board to "impute" those motivations. Likewise, NCPLS makes no headway in asserting that the Board's decision interferes with its business judgment. The Board did not impose liability because it disagreed with the wisdom of NCPLS's ostensible justifications for its actions; rather, it found that those justifications were false and therefore highly probative of NCPLS's true—and unlawful—motivations.

2. Substantial evidence also supports the Board's conclusion that NCPLS violated Section 8(a)(1) of the Act by cancelling its short-term disability policy because of the employees' protected activities. That conclusion is supported by strong circumstantial evidence of NCPLS's true motivation. The Board reasonably relied on NCPLS's commission of a contemporaneous unfair labor practice—the unlawful withholding of the pay increase—to support its finding. The Board also reasonably relied on the suspect timing of NCPLS's decision, which came just days after the employees' protected activity. Last, the

Board examined NCPLS's proffered justifications for its actions and found them to be false, thus strengthening the inference of an unlawful motive.

3. Substantial evidence also supports the Board's conclusion that NCPLS violated Section 8(a)(1) of the Act by threatening to eliminate reduced-hours work schedules in retaliation for employees' protected activities and by later making good on that threat. The Board's decision on both accounts is amply supported by direct evidence (including unlawful threats and an outright confession of retaliation) and circumstantial evidence (including other unfair labor practices, suspect timing, departure from usual practice, and NCPLS's pretextual justifications for its actions). That being so, the Board's Order is entitled to enforcement on these violations.

C. Finally, substantial evidence supports the Board's conclusion that NCPLS violated Section 8(a)(1) of the Act by constructively discharging Linda Weisel in retaliation for her protected activities. There is a surfeit of record evidence supporting the Board's conclusion that, at the very least, NCPLS reasonably should have foreseen that its unlawful actions would cause Weisel to quit. Furthermore, the Board reasonably found that Hamden's elimination of reduced-hours work schedules forced Weisel to choose between working and caring for her child, which under extant Board and Fourth Circuit law is sufficiently burdensome to support a finding of a constructive discharge.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S CONCLUSION THAT NCPLS VIOLATED THE ACT BY THREATENING AND RETALIATING AGAINST ITS EMPLOYEES BECAUSE OF THEIR CONCERTED OPPOSITION TO NCPLS'S BENEFIT POLICIES AND PROPOSED WORK-SCHEDULE CHANGES

Section 7 of the Act, 29 U.S.C. § 157, guarantees employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection." Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), implements this guarantee by making it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7. Taken together, these provisions "effectively insulate employees from . . . employer retaliation for engaging in concerted activities for mutual aid or protection, 'even though no union activity be involved, or collective bargaining be contemplated.'" *Halstead Metal Prods. v. NLRB*, 940 F.2d 66, 69 (4th Cir. 1991) (quoting *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749, 752-53 (4th Cir. 1949)). Indeed, the broad protections of the Act apply "with particular force to unorganized employees, who, because they have no designated bargaining representative, have 'to speak for themselves as best they [can].'" *Id.* at 70 (quoting *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962)).

The central question in determining a Section 8(a)(1) violation is whether, "under all of the circumstances, the employer's conduct may reasonably tend to

coerce or intimidate employees." *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1044 (4th Cir. 1997). It is well established that an employer violates Section 8(a)(1) by threatening employees with reprisal because of their protected activities. *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 280 (4th Cir. 2003). Likewise, an employer violates Section 8(a)(1) by taking tangible adverse action against employees because of their protected activities. *Washington Aluminum*, 370 U.S. at 17.

This Court's review of a Board order is deferential. It will uphold the Board's legal conclusions if they are rational and consistent with the Act. *NLRB v. Air Contact Transp., Inc.*, 403 F.3d 206, 210 (4th Cir. 2005). The Board's findings as to questions of fact are conclusive if supported by substantial evidence on the record when considered as a whole. 29 U.S.C. § 160(e); *see also Consolidated Diesel Co. v. NLRB*, 263 F.3d 345, 351 (4th Cir. 2001) ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.") (citations and quotation marks omitted). This Court may not "displace the Board's choice between two fairly conflicting views" of the evidence, even where it "would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *see also Air Contact Transp.*, 403 F.3d at 210.

This Court shows even greater deference to the Board's factual conclusions when the "administrative record is fraught with conflicting testimony." *Anheuser-Busch*, 338 F.3d at 280. As this Court has observed, "the balancing of witnesses' testimony is at the heart of the fact-finding process, and it is normally not the role of reviewing courts to second-guess a fact-finder's determinations about who appeared more 'truthful' or 'credible.'" *Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 65, 71 (4th Cir. 1996). Accordingly, this Court will not disturb the Board's adoption of the administrative law judge's credibility determinations absent "extraordinary circumstances." *WXGI, Inc. v. NLRB*, 243 F.3d 833, 842 (4th Cir. 2001). Such circumstances are limited to those rare instances in which "a credibility determination is unreasonable, contradicts other findings of fact, or is based on an inadequate reason or no reason at all." *Id.* (citations and quotation marks omitted).

As we now show, substantial evidence supports the Board's findings that NCPLS violated Section 8(a)(1), first, by repeatedly threatening its employees with reprisal, second, by taking a variety of adverse actions against its employees because of their protected activities, and, third, by constructively discharging Weisel because of her protected activities.

A. Substantial Evidence Supports the Board's Credibility-Based Finding that NCPLS Violated Section 8(a)(1) of the Act by Repeatedly Threatening Employees with Reprisal

The Board found that NCPLS violated Section 8(a)(1) by making numerous threats of reprisal against its employees because of their protected activities. Those findings, which are firmly rooted in the judge's assessment of the witnesses' credibility, are supported by substantial evidence. NCPLS's effort to overturn those findings is in vain, and this Court should enforce the Board's conclusion that NCPLS's retaliatory threats violated the Act.

At the outset, there can be no doubt that attorneys at NCPLS engaged in extensive protected concerted activities. Those activities began when Hamel marshaled the support of other attorneys for filing an EEOC charge on behalf of herself and others similarly situated. Thereafter, the attorneys' protected activities continued with the group preparation and distribution of the petition to the NCPLS board protesting NCPLS's administration of its short-term disability policy. Finally, after Hamden first proposed eliminating the reduced-hours work schedule, attorneys engaged in a variety of concerted activities opposing the plan—including communicating their opposition to both Hamden and Nakell.[4]

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[4] NCPLS concedes (Br 20 n.11) that both the EEOC charge and the petition qualify as concerted activity entitled to the full protection of the Act. Furthermore, NCPLS makes no effort to dispute the Board's conclusion that the employees engaged in protected activities when they opposed Hamden's proposal to eliminate

(continued …)

The Board found that, in response to these protected activities, Hamden made numerous threats that would coerce or chill employee exercise of protected rights. Whether an employer's "particular conduct is coercive is a question essentially for the specialized experience of the [Board]." *Grand Canyon Mining*, 116 F.3d at 1044 (citations and quotation marks omitted). And, here, the Board's conclusions in that regard are well supported. Specifically, the Board found that Hamden made unspecified threats to Hambourger by telling her that he had been "too indulgent" with the employees and that "things are going to change," as well as by telling Parks that employees were going "behind his back" and that he was "just not going to have that kind of thing anymore." (JA 773, 775; 125-27, 166-68.) Such unspecified threats are particularly ominous because they "leave the employee to conjure up various images of employer retaliation." *Dubin-Haskell Lining Corp. v. NLRB*, 375 F.2d 568, 571 (4th Cir. 1967).

The Board also found that Hamden made specific threats of retaliation by stating to Hambourger that "because of this letter I cannot ask the Board to give the staff raises" and that "because of the letter you are now less likely to get a parental

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reduced-hours work. *See IGEN Intern., Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 308 (4th Cir. 2003) (holding that contentions not raised in party's opening brief are deemed waived).

leave policy in place."[5] (JA 773, 775; 166-68.) It is well established that such threats of economic reprisal are also highly coercive and have the predictable effect of chilling the exercise of Section 7 rights the Act is meant to guarantee. *NLRB v. Stanton Enterprises, Inc.*, 351 F.2d 261, 264 (4th Cir. 1965).

For its part, NCPLS makes virtually no effort to dispute that statements of the type attributed to Hamden are unlawful threats of retaliation. Instead, NCPLS claims (Br 26-26) that such statements were never made and that the credited testimony of Hambourger and Parks should be disregarded. As is true of many arguments it makes in its brief, NCPLS's challenge boils down to a plea for this Court to abandon its ordinary role of deferring to the judge's "balancing of witnesses' testimony" and, instead, to "second-guess a fact-finder's determinations about who appeared more 'truthful' or 'credible.'" *Fieldcrest Cannon*, 97 F.3d at 71. That plea must fail, however, because NCPLS has identified nothing approaching the kind of "extraordinary circumstances" that would warrant disturbing the Board's well-supported credibility determinations. *WXGI*, 243 F.3d at 842.

The judge had the opportunity to observe the witnesses' testimony first-hand, and he based his factual findings on his consideration of both the "demeanor

[5] The Board also found that Hamden unlawfully threatened to eliminate employees' reduced-hours work schedules. That violation is dealt with at pages 44-47, below.

of the witnesses" and of "the full record." (JA 792.) With those considerations in mind, the judge found that Hambourger and Parks "impressed [him] with their credibility," whereas "Hamden was not a credible witness." (*Id*.) The judge therefore credited the account of the threats provided by Hambourger and Parks, and discredited Hamden's denials to the contrary. (*Id*.) As we now show, that determination is "peculiarly within the province of the [judge] and the Board and, therefore, entitled to acceptance on review." *Procter & Gamble Mfg. Co. v. NLRB*, 658 F.2d 968, 984 (4th Cir. 1981).

First, the conclusions drawn from the judge's up-close observation of the witnesses' demeanor are entitled to the utmost deference. Unlike an appellate court, which is consigned to reviewing a cold record, the judge is "aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985); *see also NLRB v. Overnite Transp. Co.*, 938 F.2d 815, 819 (7th Cir. 1991) ("Credibility . . . is a function not only of what a witness says but of how a witness says it . . . .").

Second, the judge properly discounted Hamden's recollection of key events, including his threatening statements, because it conflicted with the credited testimony of other witnesses. Hamden denied making coercive threats to Parks and Hambourger and claimed that he harbored no ill will against employees for

their protected concerted activities. (JA 792; 459.) Yet, the judge credited Hausen, a disinterested witness, who testified that Hamden was agitated upon finding out about the petition and referred to the employees' protected activities as a "mutiny." (JA 792; 492.) Meanwhile, the testimony of Parks and Hambourger was consistent with Hausen's recollection that Hamden reacted with hostility to the employees' protected activity; that testimony also resonates with Pollitt's recollection that Hamden accused her of "threatening gender litigation" and told her that he "couldn't take that kind of hostility." (JA 792; 47.) The judge was entitled to rely on the conflict between Hamden's testimony and that of the other witnesses to conclude that Hamden simply was not testifying candidly. *See Interior Alterations, Inc. v. NLRB*, 738 F.2d 373, 377 (10th Cir. 1984).

In contrast to the strong record support for the Board's conclusions, NCPLS's attack on the judge's credibility determinations amounts to ineffectual flyspecking. For example, NCPLS complains (Br 25-26 n.14) that Hambourger's testimony was undermined by her acknowledgement (JA 182) that Hamden said at a staff meeting that employees had a right to circulate the petition. What NCPLS appears not to consider is the obvious conclusion that, just as Hamden was not fully candid on the witness stand, he was also not being candid when he made a

statement that was seemingly supportive of employees' concerted activities.[6] After all, in a far more unguarded moment, Hamden referred to the petition as an act of "mutiny."

NCPLS therefore fails to show that the Board's credibility findings should be disregarded. Accordingly, the Court should enforce the Board's finding that NCPLS violated Section 8(a)(1) by threatening its employees with reprisal because of their protected activities.

B. Substantial Evidence Supports the Board's Conclusion that NCPLS Violated Section 8(a)(1) of the Act by Withholding a Pay Increase, Terminating Its Short-Term Disability Policy, and Eliminating Reduced-Hours Work Schedules Because of the Employees' Protected Activities

The Board also found that NCPLS committed several violations of Section 8(a)(1) by taking adverse actions against its employees because of their protected activities. Specifically, the Board found that NCPLS retaliated by withholding a pay increase, terminating its extant short-term disability policy, and eliminating

[6] NCPLS also argues that Hambourger's credibility is somehow undermined by the fact that she did not mention Hamden's threats to the NCPLS board or in her resignation letter (which, NCPLS is forced to admit, clearly accused Hamden of retaliation). (Br 25-26 n.14.) The relevance of these facts to the judge's credibility findings is nebulous at best. Suffice it to say, nothing that NCPLS has argued amounts to a showing that the judge's credibility determination "is unreasonable, contradicts other findings of fact, or is based on an inadequate reason or no reason at all." *WXGI*, 243 F.3d at 842.

reduced-hours work schedules. (JA 776-79.) The Board's findings on these violations are entitled to enforcement by this Court.

The key consideration in determining whether NCPLS unlawfully retaliated against its employees is motive. *See Halstead Metal Prods.*, 940 F.2d at 69. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401-03 (1983), the Supreme Court approved the test for determining motive articulated by the Board in *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Under that test, if the Board finds that unlawful considerations were a "motivating factor" in the employer's action, the employer may evade liability only by proving as an affirmative defense that the same action would have been taken even in the absence of the employee's protected activity. *Transportation Mgmt.*, 462 U.S. at 395, 397-403; *accord RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d 442, 448 (4th Cir. 2002). "If the Board believes the employer's stated lawful reasons are non-existent or pretextual, the defense fails." *USF Red Star, Inc. v. NLRB*, 230 F.3d 102, 106 (4th Cir. 2000).

The Board may rely on either direct or circumstantial evidence to determine the employer's motivation. *See RGC (USA) Mineral Sands*, 281 F.3d at 449. Indeed, because "[d]irect evidence of a purpose to discriminate is rarely obtained," a finding that unlawful considerations played a part in the employer's decision may be based on circumstantial evidence alone. *Corrie Corp. v. NLRB*, 375 F.2d 149,

152 (4th Cir. 1967); *see also NLRB v. Low Kit Mining Co.*, 3 F.3d 720, 728 (4th Cir. 1993). The factors from which the Board may infer an unlawful motive include: the commission of other contemporaneous unfair labor practices;[7] the suspect timing of the employer's action;[8] the employer's departure from its usual practices;[9] and the failure of the employer's proffered justification to withstand scrutiny.[10] Ultimately, the true reason for the employer's action is a question of fact "which the expertise of the Board is peculiarly suited to determine." *Perel v. NLRB*, 373 F.2d 736, 737 (4th Cir. 1967) (per curiam).

NCPLS does not dispute that its employees engaged in extensive protected activities opposing NCPLS's benefit policies and work-schedule changes. Nor does NCPLS dispute that it was aware of these protected activities. Thus, the only question that remains is whether substantial evidence supports the Board's twin conclusions that the employees' protected activities motivated NCPLS's adverse actions and that NCPLS's stated justifications for those actions were not credible.

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[7] *Alpo Petfoods, Inc. v. NLRB*, 126 F.3d 246, 253 (4th Cir. 1997).

[8] *Id.*

[9] *NLRB v. Hale Container Line, Inc.*, 943 F.2d 394, 399 & n.32 (4th Cir. 1991).

[10] *Stanton Enterprises*, 351 F.2d at 264; *cf. Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) ("[W]hen all legitimate reasons . . . have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration . . . .").

As we now show, the Board's determination that unlawful considerations played a part in NCPLS's actions is supported by ample credited and consistent evidence. Whereas, "only if the record is read with the most singleminded reverence for coincidence could [NCPLS's] assertions be entitled to any credit." *NLRB v. Horizon Air Servs., Inc.*, 761 F.2d 22, 28 (1st Cir. 1985).

1. Substantial evidence supports the Board's conclusion that NCPLS violated Section 8(a)(1) of the Act by withholding employees' pay increases because of their protected activities

The Board found that NCPLS's decision to withhold pay increases was shot through with an illicit motive. That finding is amply supported by both direct and circumstantial evidence demonstrating that NCPLS's proffered justifications for its action were false, and that its true motivation was its opposition to the employees' protected activities. Furthermore, NCPLS's various arguments against the Board's well-supported finding of a violation are without merit.

a. Direct evidence supports the Board's finding that NCPLS's withholding of the pay increase was motivated by unlawful considerations

The Board's finding of unlawful motivation is supported first and foremost by direct evidence of the NCPLS board's motivation. That is, the minutes of the August 15 meeting provide the only contemporaneous explanation for the NCPLS board's action, and those minutes reflect its express adoption of Hamden's recommendation to withhold the pay increase because of "staff benefit concerns

and pending litigation"—or, in other words, because of the very activity that NCPLS now admits was protected by the Act. Thus, "[t]his is one of those rare cases in which there has been 'an outright confession of unlawful discrimination.'" *NLRB v. John Langenbacher Co.*, 398 F.2d 459, 463 (2d Cir. 1968) (quoting *NLRB v. Ferguson*, 257 F.2d 88, 92 (5th Cir. 1958)).

NCPLS argues (Br 28) that the Board has misinterpreted this direct evidence. According to NCPLS, the minutes were meant only to communicate that the NCPLS board deferred pay raises out of concern for the unknown costs of defending the lawsuit and supplying a new insurance policy.[11] (*Id.*) But, the Board's conclusion that the minutes evince an unlawful motivation is consistent with the ample evidence documenting Hamden's hostility to the employees' protected activity, as well as Hamden's testimony that the substance and rationale

[11] In a similar vein, NCPLS contends that its actions should not be found unlawful because "[e]ven if this annotation refers to the employees' concerted activities, there is no indication that it was the employees' *actions* in bringing these concerns to the board's attention, as opposed to the substance and effects of those concerns, that led to the board's decision." (Br 22 (citing Member Schaumber's dissent at JA 747).) Contrary to the view of NCPLS, it is well established that the Act protects both the *substance* and the *form* of employees' protected activities. *See Air Contact Transp.*, 403 F.3d at 210-11. If it were otherwise, the protections of the Act would largely be illusory, as an employer would "be at liberty to punish . . . [an employee] for engaging in concerted activities which [Section] 7 of the Act protects." *Washington Aluminum*, 370 U.S. at 17. Thus, the Board has long interpreted the Act to protect the entire *res gestae* of employees' protected activity, unless their conduct is unlawful, violent, in breach of contract, or indefensible. *Air Contact Transp.*, 403 F.3d at 211; *Consumers Power Co.*, 282 NLRB 130, 132 (1986).

of his recommendation were accepted by the NCPLS board without further discussion. (JA 776; 462.)

By contrast, NCPLS's interpretation of the statement in the minutes is thoroughly undermined by the record evidence. First, one of the NCPLS board members admitted that, because Hamden had informed them that the litigation costs would be covered by insurance, the cost of defending the lawsuit was not a factor in their decision. (JA 388.) Second, NCPLS's potential exposure in the EEOC claim was already well known, as Hamel's attorney had offered to settle the case for just $4,700. (JA 234.) Finally, any realistic assessment of the potential cost of providing a new short-term disability policy would not have influenced the decision to defer raises, as the policy NCPLS eventually procured cost a mere $4,500 per year. (JA 649.)

In any event, NCPLS's argument fails because this Court cannot "displace the Board's choice between two fairly conflicting views [of the evidence], even though [it] would justifiably have made a different choice had the matter been before it de novo." *Grand Canyon Mining*, 116 F.3d at 1044 (citations and quotation marks omitted). Thus, the Board permissibly rejected NCPLS's interpretation of the statement in the minutes, finding instead that it constituted direct evidence to support a finding of NCPLS's unlawful motivation.

b. Circumstantial evidence also supports the Board's finding that NCPLS's withholding of the pay increase was motivated by unlawful considerations

As this Court has held, direct inculpatory evidence of motive—such as the clear statement in the minutes of the NCPLS board meeting—makes any examination of additional circumstantial evidence of motive "unnecessary." *RGC (USA) Mineral Sands*, 281 F.3d at 449. Nevertheless, the Board's conclusion that the withholding of the pay increase violated the Act is also supported by ample circumstantial evidence, including the suspect timing of the action, NCPLS's departure from its usual practices, and the inability of the NCPLS's asserted justifications to withstand scrutiny.

i. Timing

A "close temporal connection" between the protected conduct and NCPLS's adverse action "strongly supports the inference that [NCPLS] was unlawfully motivated." *Alpo Petfoods, Inc. v. NLRB*, 126 F.3d 246, 253 (4th Cir. 1997). Here, the Board found that, prior to the employees' petition, Hamden had placed on the agenda a recommendation for a pay increase. (JA 775; 460-62.) That recommendation was in accord with NCPLS's usual practice to award pay increases after obtaining a new contract. (JA 774; 25-26.) However, just days after the employees circulated their petition, Hamden confronted Hambourger and told her that he had been "too indulgent" with the employees and that "things are

going to change." (JA 775; 166-68.) He also told her that "because of this letter I cannot ask the Board to give the staff raises." (*Id*.) Shortly thereafter, Hamden made good on that threat when, in consultation with Lennon, he decided to rescind the recommendation for pay raises. (JA775; 460-62.) At the NCPLS board meeting days later, Lennon conveyed Hamden's recommendation by stating that raises should be withheld because of "employee complaints and ongoing litigation." (JA 775; 438.) The NCPLS board expressly adopted Hamden's recommendation, stating that it would withhold pay increases because of "staff benefit concerns and pending litigation." (JA 775; 546.) This sequence of events and the timing of NCPLS's actions make the inference of unlawful motivation "stunningly obvious." *NLRB v. S.E. Nichols*, 862 F.2d 952, 959 (2d Cir. 1988); *see also NLRB v. Frigid Storage, Inc*., 934 F.2d 506, 510 (4th Cir. 1991).

ii. Departure from usual practice

An employer's departure from normal practice is also circumstantial evidence that "signals possible ulterior motives." *NLRB v. Hale Container Line, Inc.*, 943 F.2d 394, 399 (4th Cir. 1991). The Board reasonably found that it was NCPLS's usual practice to award pay raises after entering a new contract with DOC. (JA 774; 25-26.) The NCPLS board's decision to withhold the increase in 2003 departs from that practice and is, therefore, suggestive of improper motive. It is of no moment that, as NCPLS argues (Br 25), raises were not *automatically* tied

to a new contract. One need not show that a particular practice was followed without exception; all that is necessary to strengthen the suggestion of an improper motive is proof of the employer's departure from its "*usual* practice." *Waterbury Hotel Mgm't, LLC v. NLRB*, 314 F.3d 645, 652 (D.C. Cir. 2003) (emphasis added).

iii. Pretext

In finding NCPLS's unlawful motive, the Board also reasonably relied on its conclusion (JA 776-77) that NCPLS's asserted justifications for its actions cannot withstand scrutiny. If the Board concludes that an employer's explanation for its action is false—either because it was fabricated or because it was not actually relied upon—the Board may infer that the true motive "is one that the employer desires to conceal—an unlawful motive." *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) (citations and quotation marks omitted); *see also Grand Canyon Mining*, 116 F.3d at 1047.

NCPLS now claims that it withheld pay increases, not because of the employees' protected activities, but because of concerns over the contract-hours deficit and uncertainties about the cost of moving and introducing new software. (Br 24-31.) None of those reasons are among the ones the NCPLS board expressly stated in the meeting minutes at the time it made the decision, and they may be discounted on that ground alone. *See Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 105 (D.C. Cir. 2003) ("[S]hifting explanations . . . undermine

[an employer's] nondiscriminatory explanation for [its] adverse action."). As Hamden testified, there was no mention of these newly-articulated and supposedly decisive factors at the NCPLS board meeting. (JA 462.) Rather, the NCPLS board expressly adopted Hamden's recommendation, along with its unlawful justification, without discussion. (*Id*.)

NCPLS places its heaviest emphasis on the contract-hours deficit as a reason for withholding raises. (Br 29-30). But such a justification makes little sense on its own terms, and NCPLS never explains how withholding pay raises for salaried attorneys would have any impact on the contract-hours deficit, especially when Hamden planned to eliminate the deficit using only the existing complement of attorneys. *See Citizens Investment Servs. Corp. v. NLRB*, 430 F.3d 1195, 1202 (D.C. Cir. 2005) ("[L]ack of clarity and consistency in explaining reasons for termination is an important factor in evaluating the proffered justifications."). In any event, NCPLS's justification is belied by the testimony of one of its primary witnesses, Nakell, who expressly disavowed the contract-hours deficit as a reason for the NCPLS board's decision to withhold pay increases.[12] (JA 336.)

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[12] Nakell's testimony in that regard was as follows:

> Q. Do you remember any number being told at that meeting of how many hours NCPLS was behind in the [contract] hours?
>
> A. It seems to me it was a number in excess of a thousand hours, but I'm not sure. It's what I'm thinking now.

(continued …)

NCPLS also claims that its decision to defer pay increases was motivated by uncertainties over the costs of an upcoming office relocation and the implementation of new software. (Br 30-31.) As the Board found, however, that justification rings hollow. Not only was there no mention of these concerns in the NCPLS board's minutes explaining its decision, but also NCPLS had already budgeted for those expenses when Hamden first placed his recommendation for raises on the agenda. (JA 777; 462-63.) Furthermore, the notion that uncertainties exist in budgets is true in only the most banal sense that budgets are *always* plagued by uncertainties, especially at the very beginning of a budgeting period. However, such uncertainties had not previously deterred NCPLS from regularly granting pay increases immediately after a new contract was in place. (JA 774; 25-

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* * *

Q. This was a major concern at that time?

A. That's correct.

Q. The [NCPLS] board was, in fact, so concerned with it that they didn't give a pay raise, correct?

A. I don't think that's the reason for not giving a pay raise.

Q. It's not?

A. No, I don't think so.

Q. Okay.

A. I don't recall any association between the shortage in [contract] hours and the decision to defer a pay raise.

(JA 336.)

26.) Thus, NCPLS's appeal to these budgetary concerns cannot negate the powerful direct and circumstantial evidence of an unlawful motive, and the Board was entitled to conclude that those explanations for NCPLS's actions were "a mere litigation figment." *Marathon LeTourneau Co. v. NLRB*, 699 F.2d 248, 252 (5th Cir. 1983).

Ultimately, the Board's rejection of NCPLS's proffered justifications boils down to a determination of credibility. Based on his evaluation of the witnesses' demeanor and the entire record, the judge did not credit the NCPLS witnesses who offered the ostensible justifications for withholding the pay increase. (JA 792-93 & n.44.) Instead, the judge credited both the direct and circumstantial evidence indicating that the deferral of pay raises was based on unlawful considerations. (*Id*.) The Board's decision, which adopts the judge's credibility-based findings, is entitled to deference because NCPLS has shown no "extraordinary circumstances" for disturbing its judgment. *WXGI*, 243 F.3d at 842. Moreover, because the Board reasonably rejected NCPLS's proffered justifications, NCPLS necessarily fails in its effort to prove as a defense that it would have taken the same action even in the absence of unlawful considerations. *See USF Red Star*, 230 F.3d at 106.

c. NCPLS's other arguments against the Board's finding of an unlawful motive are without merit

In the face of all the foregoing evidence, NCPLS mounts two other attacks on the Board's finding that the deferral of pay raises violates Section 8(a)(1). First,

NCPLS argues (Br 24-27) that the Board's decision improperly imputes Hamden's well-documented hostility toward the employees' protected activity to an otherwise innocent NCPLS board. Second, NCPLS argues (Br 30, 34-35) that the Board's decision is an unwarranted interference with NCPLS's business judgment. Both of these arguments can be easily dispatched.

First, NCPLS mischaracterizes the Board's reasoning and, in so doing, attempts to hide its violation behind the skirt of the NCPLS board's independent judgment. As the Board's decision makes clear (JA 776-77), this is not a case where the formal decisionmaker, unaware that a subordinate harbors an unlawful motive, considers the subordinate's input in deciding to take some adverse action against its employees. *Cf. Hill v. Lockheed Martin Logistics Mgm't, Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc) (examining so-called "cat's paw" theories of liability under federal antidiscrimination laws). Rather, the NCPLS board was well aware of the employees' protected activity—not only had the NCPLS board's members received copies of the employees' petition, but they were also actively involved in the denial of Hamel's claim for short-term disability benefits and her recently-initiated EEOC claim. (JA 774; 83, 159-63, 566-67.) Furthermore, as the Board reasonably concluded (JA 776), the NCPLS board expressly adopted both the substance of Hamden's recommendation (to defer the pay increase) and his unlawful justification for that recommendation ("employee complaints and

ongoing litigation"). Because the NCPLS board expressly adopted Hamden's retaliatory motives, there was no need for the Board to "impute" those motivations to the NCPLS board by inference. It is therefore no defense that the NCPLS board exercised independent judgment in deciding to withhold pay raises, since it exercised that judgment in an unlawful way by withholding the pay increase based on the impermissible consideration of the employees' protected activity.

NCPLS also complains (Br 30, 34-35) that the Board's rejection of its proffered justifications second-guesses NCPLS's business judgment. To the contrary, the Board did not impose liability because it disagreed with the *wisdom* of NCPLS's asserted justifications for its actions; rather, the Board permissibly scrutinized the inherent unsoundness of those justifications as probative of their *falsity*. The distinction lies between a business judgment that is ill-considered but honest, and one that, like NCPLS's, is manufactured to avoid liability under the Act. *See Temp-Masters, Inc. v. NLRB*, 460 F.3d 684, 693 (6th Cir. 2006); *NLRB v. GATX Logistics, Inc.*, 160 F.3d 353, 357 (7th Cir. 1998). The Board's finding that NCPLS violated Section 8(a)(1) of the Act by withholding the pay increase is therefore entitled to enforcement by this Court.

2. Substantial evidence supports the Board's conclusion that NCPLS violated Section 8(a)(1) of the Act by cancelling its short-term disability policy because of the employees' protected activities

Substantial evidence also supports the Board's conclusion that NCPLS violated Section 8(a)(1) of the Act by cancelling its short-term disability policy because of the employees' protected activities. Although there is no *direct* evidence of the NCPLS board's unlawful motive for terminating the policy, such evidence is not necessary to establish a violation. *See Low Kit Mining*, 3 F.3d at 728. Here, the Board's decision is supported by compelling circumstantial evidence—including NCPLS's commission of contemporaneous unfair labor practices, the suspect timing of its decision, and the proffering of pretextual justifications for its actions.

First, NCPLS's contemporaneous unfair labor practices provide "forceful evidence of unlawful motive." *Alpo Petfoods*, 126 F.3d at 253. The Board's well-supported conclusion that NCPLS violated Section 8(a)(1) by deferring employees' pay increases because of their protected activity is especially probative of its motive for cancelling the short-term disability policy. Those two events occurred virtually simultaneously—in the very same closed session of the NCPLS board meeting and in response to the very same protected activity—and the Board properly inferred that the NCPLS board shared the same motivation for both actions.

Second, the Board's conclusion is supported by the suspicious timing of NCPLS's actions. NCPLS had been on notice that its short-term disability policy was in question as of early 2003, when Hamel first requested and was denied benefits. Moreover, that spring, Hamel's attorney corresponded with Nakell directly, alleging that the policy was unlawful as applied. Despite this controversy surrounding the policy, the NCPLS board took no action. Then, less than 3 weeks after Hamel's EEOC charge, and just 7 days after the employees' petition, it repealed the policy altogether. This "close temporal connection" between the protected conduct and the adverse action "strongly supports the inference that [NCPLS] was unlawfully motivated." *Alpo Petfoods*, 126 F.3d at 253.

Finally, the Board properly found (JA 777-78) that NCPLS's asserted reasons for its actions were pretextual. NCPLS claims (Br 31-35) that the termination of the policy was lawful because it was simply doing what the employees asked and was legitimately concerned about maintaining an unlawful policy. However, nothing in the petition suggests that employees preferred having *no* coverage to the alternative of keeping the extant policy in place while another was found.[13] Quite the opposite is true, as the petition stated:

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[13] If the NCPLS board members had any doubts on this account, they could have asked for clarification from the petition's principal author, Hambourger, who attended the August 15 board meeting and announced that she was available to answer any questions. (JA 170, 305.)

> [W]e want to let the Board know *how important our benefits are to us*. We hope short-term disability insurance *will remain a benefit* for NCPLS employees and that it will apply to temporary disability arising from pregnancy and childbirth as it does to any other short-term disability.

(JA 545 (emphasis added).)

Furthermore, NCPLS's supposed concerns about continuing to maintain an unlawful policy ring hollow. The employees were plainly not contending that the policy was inherently unlawful, for there is nothing facially discriminatory in the language of the policy. (JA 524-25.) Instead, Hamel's attorney explicitly advised Nakell that "[t]he question of a violation of Title VII arises only in how the policies are applied." (JA 571-73.) Hence, there was no legitimate reason for NCPLS to eliminate its policy before starting its search for another one.

Nor is there any significance to the fact that NCPLS eventually secured a new short-term disability policy.[14] Rather than actually addressing the employees' concerns, NCPLS's decision to eliminate short-term disability for a period of time evoked the "suggestion of a fist inside the velvet glove," and its employees were

[14] NCPLS also argues (Br 11-12) that no employees were financially harmed by the gap in coverage because both Hamel and Parks were paid retroactively for their disability leave. But that issue has no impact on the Board's well-supported conclusion that the cancellation of the policy violated Section 8(a)(1). After all, an action will be deemed to violate Section 8(a)(1) so long as it "may reasonably tend to coerce or intimidate employees." *Grand Canyon Mining*, 116 F.3d at 1044. The extent to which NCPLS's violation resulted in financial harm to the employees is an issue that is properly addressed in a subsequent compliance proceeding before the Board. *See Eldeco, Inc. v. NLRB*, 132 F.3d 1007, 1013 n.2 (4th Cir. 1997).

not likely to miss the inference that the source of the new policy "is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). The Board therefore reasonably concluded that NCPLS's elimination of the policy violated Section 8(a)(1) because it tended to coerce or intimidate employees in the exercise of their Section 7 rights. *See Grand Canyon Mining Co.*, 116 F.3d at 1044.

3. Substantial evidence supports the Board's conclusion that NCPLS violated Section 8(a)(1) of the Act by eliminating and threatening to eliminate employees' reduced-hours work schedules in retaliation for their protected activities

The Board also found that NCPLS violated Section 8(a)(1) by threatening to eliminate reduced-hours work schedules in retaliation for employees' protected activities and by later making good on that threat. The Board's decision on both accounts is amply supported by direct evidence (including unlawful threats and an outright confession of retaliation) and circumstantial evidence (including other unfair labor practices, suspect timing, departure from usual practice, and NCPLS's pretextual justifications for its actions). That being so, this Court must enforce the Board's findings on those violations.

a. Direct evidence supports the Board's finding that NCPLS unlawfully threatened employees and eliminated reduced-hours work schedules

Here, there is an abundance of direct evidence supporting the Board's findings of a violation. First and foremost, the Board found that Hamden made

repeated threats to eliminate reduced-hours work schedules. He did this at the staff meeting on August 19, when he said that such a change was meant to address "factionalism" in the office. (JA 778; 166-68.) And, after Hamden withdrew his first proposal for 48-hour workweeks, he issued another threat when he told Parks, "I could still do 40 hours a week if that's what I choose to do." (JA 775; 127-29.) As the Board found (JA 778), these statements are themselves coercive threats that violate Section 8(a)(1), and they are therefore especially probative evidence that Hamden's eventual decision to eliminate the reduced-hours schedule was based on unlawful considerations. *See Alpo Petfoods*, 126 F.3d at 253.

In addition, Hamden made numerous thinly-veiled references to the employees' protected activities when discussing his reasons for eliminating the reduced-hours work schedule. For example, Hamden told Pollitt that he was eliminating reduced-hours work schedules because of "hostility" he had received in response to his earlier proposal to mandate 48-hour workweeks. (JA 776; 47.) In the same conversation, he singled out Pollitt and Weisel for having "threatened gender litigation" and thinking that working reduced hours was an "entitlement." (*Id.*) Hamden made similar remarks to Parks, when he said that Pollitt and Weisel "continued to undermine" his authority and "stir up trouble," and that he could not "put up with it anymore." (JA 775; 125-27.) Then, in a later conversation with Parks, Hamden said of his decision to eliminate reduced-hours schedules: "It's not

because of the contract hours and it's not because of the money for the benefits, but it's because some people here think it's an entitlement to work part-time." (JA 775; 127-29.)

The Board permissibly viewed these references to "factionalism," "hostility," "entitlement," and "stir[ring] up trouble" as highly probative of Hamden's unlawful motivation. *See Citizens Investment Servs.*, 430 F.3d at 1203 (noting that, "if management perceives pressing protected complaints . . . as 'making trouble,' this attitude supports the inference" that the employer retaliated against employees for engaging in concerted activities). Indeed, Hamden's candid statement—that the elimination of reduced-hours schedules was not about contract hours or money for benefits and was, instead, meant to show employees that working reduced hours was not an "entitlement" (JA 127-29)—amounts to an "outright confession of unlawful discrimination eliminating any question concerning the intrinsic merits [of the violation] . . . or other causes suggested as the basis for [Hamden's decision]." *NLRB v. Globe Prods. Corp.*, 322 F.2d 694, 696 (4th Cir. 1963) (citations and quotation marks omitted).

As we have already demonstrated above (pp. 24-27 & n.6), NCPLS's efforts to dispute the veracity of the employees' testimony (Br 25-26 n.14, 40-43) are doomed to fail because NCPLS cannot show "extraordinary circumstances" for disturbing the Board's credibility findings. *WXGI*, 243 F.3d at 842. Moreover,

NCPLS fails in its effort to portray Hamden's statements as something other than direct evidence of unlawful motivation. NCPLS contends that Hamden's damning statements to Parks and Pollitt were "based on a disagreement over workload distribution, and w[ere] not the same as hostility in response to the petition." (Br 41.) However, what NCPLS appears not to recognize is that the petition was not the *only* protected activity involved in the case: the Board explicitly found (JA 778) that the employees' concerted opposition to Hamden's work-schedule proposal *also* qualifies as protected activity. Thus, NCPLS's argument is, in reality, a concession of the violation. *See Hale Container Line*, 943 F.2d at 400 (holding that adverse action against employee "due to his attitude" was still unlawful because the allegedly poor attitude was displayed during the employee's protected activity).

b. Circumstantial evidence supports the Board's finding that NCPLS unlawfully eliminated employees' reduced-hours work schedules

Again, given the wealth of direct evidence establishing Hamden's true motivation, any resort to circumstantial evidence of motive should be "unnecessary." *RGC (USA) Mineral Sands*, 281 F.3d at 449. Nevertheless, the Board's finding of a violation is also supported by such evidence, including other contemporaneous violations of the Act, suspect timing, NCPLS's departure from

its usual practices, and the inability of the NCPLS's asserted justifications to withstand scrutiny.

i. Contemporaneous unfair labor practices

In addition to Hamden's unlawful threats to eliminate reduced-hours work schedules, Hamden's other coercive threats lend credence to the Board's conclusion that Hamden's actions were unlawfully motivated. Those violations include Hamden's unspecified threats (telling Hambourger that he had been "too indulgent" with the employees and that "things are going to change," as well as telling Parks that employees were going "behind his back" and that he was "just not going to have that kind of thing anymore") and his specific threats of reprisal (telling Hambourger that "because of this letter I cannot ask the Board to give the staff raises" and that "because of the letter you are now less likely to get a parental leave policy in place"). (JA 775; 166-68.) Because these violations all speak to Hamden's personal hostility to the employees' protected activities, they provide particularly "forceful evidence of unlawful motive." *Alpo Petfoods*, 126 F.3d at 253.

ii. Timing

The Board's finding of a violation is also supported by the "close temporal connection" between the employees' protected conduct and Hamden's actions. *Alpo Petfoods*, 126 F.3d at 253. Here, Hamden made his threatening proposal to

eliminate reduced-hours work schedules less than 2 weeks after the employees had circulated their petition. The timing of Hamden's actions therefore makes the inference of unlawful motivation "stunningly obvious." *S.E. Nichols*, 862 F.2d at 959.

NCPLS argues (Br 29-30) that the timing of events was not suspicious because Hamden had not even discovered the contract-hours deficit until July. But that assertion is in significant tension with testimony that contract hours were closely monitored and reported to the NCPLS board on a regular basis. (JA 777; 310, 371-72, 419-20.) Although NCPLS now claims that there was no need to monitor the hours prior to July because no contract was in place until then, it is simply not plausible that Hamden would negotiate and commit NCPLS to a 3-year retroactive contract without having any idea of the number of contract hours NCPLS had already completed. *See Temp-Masters*, 460 F.3d at 693 (noting that the Board properly examines the inherent unreasonableness of an employer's asserted justifications to determine whether they are credible).

iii. Departure from usual practice

The Board's conclusion is also supported by evidence that Hamden's decision to eliminate reduced-hours schedules departed from NCPLS's usual practice when dealing with a deficit in contract hours. In the past, such deficits had been addressed by adding contract attorneys on a temporary basis or by requiring

existing attorneys to work extra hours in proportion to their work schedules. (JA 778; 52, 220-21.) Hamden departed from these usual practices by eliminating reduced-hours schedules altogether and by not asking full-time attorneys to work any additional hours. Also, Hamden's chosen approach—to balance the entire 1200-hour deficit on the backs of just four attorneys (many of whom had already signaled that the proposal would force them to resign)—was simply inexplicable as a means of accomplishing a legitimate business goal. Thus, the Board reasonably inferred that the true reason for Hamden's decision was an illegitimate one. *See Hale Container Line*, 943 F.2d at 399 & n.32.

iv. Pretext

The Board also reasonably found that NCPLS's stated justifications for the elimination of reduced-hours work were pretextual. Naturally, the most powerful evidence of pretext was Hamden's admission to Parks that his plan to eliminate reduced-hours work schedules "was not because of the contract hours." (JA 775; 127-29.) As Hamden explained to Parks, the plan was instead implemented to punish those who thought it was an "entitlement" to work that schedule. (*Id.*) NCPLS has shown no "extraordinary circumstances" for upsetting the judge's decision to credit that evidence, *WXGI*, 243 F.3d at 842, so Hamden's admission should be viewed as eliminating any doubts regarding his true—and unlawful—motivation.

The Board's finding of pretext was also strengthened by the fact that Hamden's plan made little sense as a means of serving its asserted purpose of eliminating the contract-hours deficit. As noted above, only four attorneys would have been required to work additional hours as a result of Hamden's plan, and it is not plausible that this action was truly intended to make up the 1200-hour deficit. The Board reasonably concluded from this evidence (JA 778) that Hamden's actual motivation for the schedule change was a retaliatory one. *See Stanton Enterprises*, 351 F.2d at 264 (holding that the Board may infer an unlawful motive from "the flagrant inconsistencies and contradictions in the employer's explanations").

c. NCPLS's remaining arguments are without merit

NCPLS offers a farrago of other arguments meant to undermine the Board's well-supported finding of a violation. All those remaining arguments, however, fall wide of their mark.

NCPLS contends (Br 39) that Hamden had the authority to modify employees' work schedules and eliminate reduced-hours schedules. But that argument is neither here nor there. As this Court has observed, "[t]he principle that otherwise lawful acts can be rendered unlawful when motivated by improper intentions is widely accepted and appears repeatedly throughout the law." *RGC (USA) Mineral Sands*, 281 F.3d at 450. Thus, even though Hamden had the authority to eliminate the reduced-hours work schedules, the Act forbids him from

exercising that authority with the intent to punish or discourage protected concerted activity. *Id.*

NCPLS also argues (Br 38, 42) that the elimination of reduced-hours work schedules cannot constitute a violation of Section 8(a)(1) because Hamden's decision only affected some, but not all, of the employees who signed the petition. That argument has no basis in this Court's precedent, which holds that a "discriminatory motive, otherwise established" is not disproved by an employer's demonstration that it did not "weed out" each and every employee who engaged in protected activity. *WXGI*, 243 F.3d at 843-44 (citation and quotation marks omitted). Put differently, an "[a]dverse employment action in retaliation for concerted activity violate[s] the [Act], even if the employer wields an undiscerning axe." *Frigid Storage*, 934 F.2d at 510. And, here, it should be seen as no coincidence that Hamden's retaliatory actions caused particular hardship for the small group of attorneys who worked reduced-hours schedules. The employees' concerted activities all focused on NCPLS's policies affecting the interests of working mothers, and Hamden's hostility to the employees' activities arose partly from his perception that working mothers regarded certain benefits as "an entitlement." (JA 775-76; 47, 127-29.) In addition, Hamden repeatedly singled out Weisel and Pollitt—both of whom worked reduced-hours schedules—as leaders of the group that was undermining his authority. (JA 775-76; 47, 125-27.)

Thus, Hamden's actions affecting the attorneys who worked reduced-hours scheduled are entirely in line with the hostility he displayed to their protected activities.

Finally, NCPLS argues (Br 43-44) that any unlawful motive is undercut by Hamden's subsequent efforts to promote a handful of attorneys who engaged in some of the protected conduct. But simply pointing to some evidence that could be construed in NCPLS's favor, while failing to rebut the overwhelming evidence against it, is "not the same as showing that there was not substantial evidence to support the inferences drawn by the Board." *Citizens Investment Servs.*, 430 F.3d at 1201. Moreover, none of the events NCPLS describes are inconsistent with a finding that Hamden's earlier actions were motivated by unlawful considerations. Those retaliatory acts had precipitated the departure of several attorneys, thus diminishing the pool from which Hamden could make promotions. Thus, it is entirely plausible that Hamden's need to fill vacant positions overcame his hostility toward those employees' past protected activity.

In any event, NCPLS cannot rebut the Board's well-supported finding of certain violations by pointing out that it did not compound its liability by committing *further* violations of the Act. After all, "a piece of fruit may well be bruised without being rotten to the core." *Cooper v. Federal Reserve Bank*, 467

U.S. 867, 880 (1984). Thus, the violation found by the Board is entitled to enforcement.

C. Substantial Evidence Supports the Board's Conclusion that NCPLS Violated Section 8(a)(1) of the Act by Constructively Discharging Weisel in Retaliation for Her Protected Activities

The final unfair labor practice found by the Board is that NCPLS violated Section 8(a)(1) by constructively discharging Weisel because of her protected activities. As with all of the other violations found by the Board, its finding of a constructive discharge enjoys the support of substantial evidence, including the judge's credibility-based of determination of NCPLS's unlawful motive. Meanwhile, NCPLS's efforts to attack that well-supported conclusion are all unavailing.

The rationale behind the constructive-discharge doctrine is to ensure that an employer bent on squelching protected activity cannot skirt the Act's clear prohibitions by using indirection. *See Chicago Apparatus Co.*, 12 NLRB 1002, 1020 (1939), *enforced*, 116 F.2d 753 (7th Cir. 1940). The Board will find that an employer constructively discharged an employee if (i) it acted with the intent to discourage or punish protected activity and (ii) its conduct created intolerable working conditions forcing the employee to resign. *Grand Canyon Mining*, 116 F.3d at 1044; *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976).

Here, the Board's findings on both of these elements are supported by substantial evidence.

1. Substantial evidence supports the Board's conclusion that Hamden eliminated reduced-hours work with the intent to discourage Weisel's protected activity

As the Board has shown throughout this brief, there is a goldmine of evidence that Hamden eliminated reduced-hours schedules in retaliation for the employees' protected activities. Indeed, Hamden confessed his unlawful motivation when he said to Parks that he planned to eliminate reduced-hours work "not because of the contract hours," but "because some people here think it's an entitlement to work part-time." (JA 775; 127-29.) That confession resonates with all of the evidence—both direct and circumstantial—that Hamden was motivated by a deep and abiding hostility to the employees' protected activities and by his belief that Weisel was one of the key leaders in those activities.

On top of that, in findings adopted by the Board, the judge found that "Hamden specifically intended to force reduced hours attorneys [including Weisel] to resign." (JA 800.) Although Hamden denied having that intention, the judge "specifically discredited" his denial, and with good reason: the credited testimony establishes that Hamden singled out Weisel as someone who "undermine[d]" his authority and "stir[red] up trouble," and said that he would not "put up with it anymore"; he also accused Weisel of "threaten[ing] gender litigation" and

criticized her for treating reduced-hours work an "entitlement." (JA 775, 800; 47, 125-29.) Although NCPLS disagrees with these credibility-based findings, it has shown no "extraordinary circumstances" for disregarding them. *WXGI*, 243 F.3d at 842.

In any event, the intent element for constructive discharge will be satisfied so long as the employer "reasonably should have foreseen" that its actions would cause an employee to quit. *American Licorice Co.*, 299 NLRB 145, 148 (1990). And, as the record in this case reveals, there is overwhelming evidence that the probable consequences of Hamden's actions should have been obvious. In their letter responding to Hamden's initial proposal, both Weisel and Pollitt clearly stated that they had been working reduced-hours for many years and that their family obligations had been structured around that schedule. (JA 775; 553-54.) And, when Weisel and Pollitt met with Nakell following Hamden's initial proposal, Weisel told him that she could not work at NCPLS if she could not have a reduced-hours schedule. (JA 775; 37-40, 61, 196.) In addition, another attorney wrote a letter to Hamden in response to his initial proposal and stated that eliminating reduced-hours work "r[a]n the risk of losing staff members who see this as a choice between their jobs and their families" (JA 557), and a staff member told Hamden that there was "a very good chance" that Weisel and others would resign if Hamden implemented a 40-hours-per-week policy (JA 404). Indeed,

Hamden even acknowledged the possibility that some attorneys would resign as a result of his plan to eliminate the reduced-hours schedule. (JA 779; 404-06.) Thus, the Board reasonably concluded that Weisel's resignation was a foreseeable consequence of the hardship caused by the elimination of that reduced-hours work.

2. Substantial evidence supports the Board's conclusion that NCPLS's retaliatory elimination of reduced-hours work schedules was sufficiently intolerable to force a reasonable employee in Weisel's position to resign

The Board also reasonably concluded that the second prong of the constructive-discharge inquiry—namely, that NCPLS's conduct created intolerable working conditions forcing Weisel to resign—was satisfied by the record evidence. In determining whether working conditions are sufficiently intolerable to justify a finding of constructive discharge, the Board applies an objective standard, inquiring whether the burdens imposed by the employer's conduct would cause a reasonable person in the same situation to resign. *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 786 (6th Cir. 2002); *Lively Electric, Inc.*, 316 NLRB 471, 473 n.8 (1995). That standard was easily met here.

This Court has already accepted the proposition, well established by Board law, that "an employer can create intolerable working conditions by refusing to consider an employee's personal child care problems." *Grand Canyon Mining*, 116 F.3d at 1049-50; *see also Yellow Ambulance Serv.*, 342 NLRB 804, 807 (2004); *American Licorice*, 299 NLRB at 148-49; *Magnolia Manor Nursing Home*,

260 NLRB 377, 387 (1982); *Bennett Packaging Co.*, 285 NLRB 602, 602 (1980). Indeed, in *Grand Canyon Mining*, this Court acknowledged that far lesser burdens engendered by the employer's retaliatory conduct, such as transportation problems, can be significant enough to support a finding of constructive discharge. 116 F.3d at 1049-50; *see also L.S.F. Transp., Inc. v. NLRB*, 282 F.3d 972, 982 (7th Cir. 2002); *NLRB v. Bestway Trucking, Inc.*, 22 F.3d 177, 181 (7th Cir. 1994). This Court also recognized that an employer may not avoid liability for a constructive discharge by characterizing the burdens created by its unlawful conduct as "personal rather than work related." *Grand Canyon Mining*, 116 F.3d at 1049.

As the Board found (JA 779), the elimination of reduced-hours work was a significant enough burden on Weisel's child-care obligations to be objectively intolerable. Weisel began working a reduced-hours schedule in 1986 and structured her family obligations around that arrangement. (JA 800; 208-210, 224-25, 228-40.) Weisel is the primary caregiver of her son, who was 12 years old in 2003. (*Id.*) She was responsible for taking her son to and from school, sports practices, music lessons, camps, medical appointments, religious studies, and sundry other school events. (*Id.*) She also assisted her son with his homework and school assignments. (*Id.*) Her husband, an attorney, worked roughly 60 hours per week. (*Id.*) Under Hamden's new plan, which required attorneys to work 40

billable hours per week, Weisel would actually have to work significantly *more* than that to satisfy the plan's requirements.[15] (JA 779; 207.)

NCPLS suggests (Br 51-52) that Weisel's family obligations are nothing more than "scheduling choices" that could be avoided if Weisel worked irregular hours or brought her child to work instead of to his extracurricular, religious, and other activities. But, contrary to NCPLS's suggestion, the constructive discharge doctrine does not allow an employer to use its own unlawful conduct to make hostages of an employee and her family. The purpose of requiring that the employer's conduct be "intolerable" is simply to discourage employees from quitting precipitously and thereby running up damages against the employer. Thus, Weisel was not required to sacrifice her longstanding child-care arrangements or her son's ability to develop his talents just to accommodate Hamden's unfair labor practices. The Board reasonably concluded that the unlawful change in schedule would require a reasonable person in Weisel's shoes to "choose between working and caring for [her] child[]." *Yellow Ambulance Serv.*, 342 NLRB at 807. As such, the retaliatory change in working conditions was "sufficiently burdensome to support a finding of a constructive discharge." *Id.*

[15] Weisel estimated that it would take her between 45 and 50 hours to meet the 40-billable-hour requirement. (JA 207.)

NCPLS also argues (Br 47) that the Board's finding of a constructive discharge is insupportable because other NCPLS employees with families managed to work 40-hour weeks.[16] The fact that other employees worked full-time schedules is not determinative of whether a constructive discharge occurred. *See J.P. Stevens & Co., Inc. v. NLRB*, 461 F.2d 490, 495 (4th Cir. 1972). The relevant inquiry is whether NCPLS's actions would cause the resignation of a reasonable person *in Weisel's same situation*. *FiveCAP*, 294 F.3d at 786. Yet, NCPLS inappropriately compares Weisel to non-attorneys whose schedules are measured by regular hours, not *billable* hours. When the correct comparison is made, the reasonableness of the Board's conclusion is underscored by the fact that, of the four attorneys working reduced-hours schedules in 2003, three of them (including Weisel) resigned in the wake of Hamden's decision. (JA 776; 581, 583, 586.) Pollitt, the only one of the four who continued working at NCPLS, was only able to satisfy the 40-hour billing requirement by using her personal leave time to make up the difference each week after January 1, 2004. (JA 776; 50, 587-88.)

[16] Relatedly, NCPLS argues (Br 49) that Hamden's elimination of reduced-hours work cannot support a finding of constructive discharge because that decision affected *all* of NCPLS's attorneys equally. NCPLS seems unaware that this argument is directly contrary to the argument it advances elsewhere (Br 38, 42) that the decision to eliminate reduced-hours work was lawful because it only affected *some* of NCPLS's attorneys. Even setting aside this obvious incoherence, NCPLS's argument is still meritless, as it is clear the Hamden's decision affected only the four attorneys then working reduced-hours schedules.

Finally, NCPLS contends (Br 51 n.23) that the elimination of reduced-hours schedules was not sufficiently burdensome because Hamden called the change "temporary." But Hamden did not even announce the supposedly "temporary" nature of the change until after Weisel had resigned. (JA 788, 792; 510, 645.) More importantly, there is no indication that the change was, in fact, temporary. At the time of the hearing, more than 8 months after the events in question, Hamden's prohibition on reduced-hours schedules remained in effect, and the attorneys had been given no indication that it would end any time soon. (JA 776; 50, 248, 358-59.) NCPLS's arguments are therefore without merit, and the Board is entitled to enforcement of its finding that NCPLS violated the Act by constructively discharging Weisel.

CONCLUSION

For the reasons stated above, the Board respectfully requests that this Court grant enforcement of the Board's Order and deny NCPLS's petition for review.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND LENGTH LIMITATIONS

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,733 words typed in Times New Roman, 14-points.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NORTH CAROLINA PRISONER LEGAL SERVICES, INC.	)	
Petitioner/Cross-Respondent	)	Nos. 07-2008, 07-2111
v.	)	Board Case No. 11-CA-20238
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by overnight delivery service the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by overnight delivery service upon the following counsel at the addresses listed below:

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